



Telecom Decision CRTC 2019-122

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SouthWestern Integrated Fibre Technology Inc. – Application to review and vary Telecom Regulatory Policy 2018-377

*The Commission **denies** SouthWestern Integrated Fibre Technology Inc.'s (SWIFT) application to review and vary Telecom Regulatory Policy 2018-377. SWIFT has failed to demonstrate that there is substantial doubt as to the correctness of the Commission's determinations, which did not amount to errors in law and in fact.*

Background

1. In Telecom Regulatory Policy 2016-496, the Commission established a universal service objective: Canadians, in urban areas as well as in rural and remote areas, have access to voice services and broadband Internet access services, on both fixed and mobile wireless networks. To measure the successful achievement of this objective, the Commission established several criteria, including that Canadian residential and business fixed broadband Internet access service subscribers should be able to access speeds of at least 50 megabits per second (Mbps) download and 10 Mbps upload, and to subscribe to a service offering with an unlimited data allowance.
2. To assist in achieving the universal service objective, the Commission announced its intention to establish a funding mechanism for broadband Internet access services.
3. In Telecom Notice of Consultation 2017-112, the Commission launched a proceeding on the development of its broadband funding regime. Consequently, in Telecom Regulatory Policy 2018-377, the Commission established the framework for the Broadband Fund, including the criteria it would use to evaluate projects. The Commission stated that the objective of the Broadband Fund is to fund projects to build or upgrade access and transport infrastructure for fixed and mobile wireless broadband Internet access services to achieve the universal service objective, in order to close the gap in connectivity in underserved areas.
4. Specifically, the Commission determined that to be eligible for funding for a fixed broadband Internet access service project, an applicant must propose to build or upgrade infrastructure in an eligible geographic area, defined as a 25 km² hexagon where there is at least one household, as per Statistics Canada's latest census data, but where no household has access to broadband Internet access service at universal service objective-level download and upload speeds (i.e. 50/10 Mbps).

5. The Commission also determined that it would not incorporate a challenge mechanism for ineligible geographic areas.

Application

6. The Commission received an application from SouthWestern Integrated Fibre Technology Inc. (SWIFT),¹ dated 19 December 2018, in which SWIFT requested that the Commission review and vary Telecom Regulatory Policy 2018-377. SWIFT challenged the Commission’s determinations with respect to (i) the use of hexagons to define geographic eligibility for fixed broadband Internet access service projects, and (ii) the exclusion of partially served hexagons from eligible geographic areas. SWIFT submitted that there is substantial doubt in both law and fact as to the correctness of the Commission’s determinations, and that they are likely to have a large negative impact on communities with sub-par Internet quality in southwestern Ontario and likely in the rest of Canada.
7. In particular, SWIFT argued that the Commission
 - prioritized administrative objectives over the statutory objectives outlined in the *Telecommunications Act* (the Act);
 - failed to consider counterfactual evidence regarding the use of the hexagon methodology;
 - introduced a new principle that in partially served hexagons, market forces are “likely” to improve connectivity; and
 - failed to consider scale economics and project quality in making its determinations.
8. SWIFT requested that the Commission provide the following relief:
 - redefine service area boundaries as the edge of exclusion zones, and then define everywhere else lacking broadband Internet access services that meet the Commission’s “basic service” thresholds as eligible to apply for funding from the Broadband Fund;
 - allow underserved communities to provide other evidence, such as standardized Internet measurements, to demonstrate their needs and eligibility to apply;
 - vacate the new principle that in partially served hexagons, market forces are “likely” to improve connectivity; and

¹ SWIFT represents the Internet connectivity interests of 15 rural municipalities in southwestern Ontario. Its mandate is to ensure that everyone in those municipalities has equitable access to ultra-high-capacity fibre-optic Internet connectivity.

- specify that applicants with proposed projects that (i) would serve underserved areas in partially served hexagons and (ii) are in the vicinity of fully underserved hexagons will be eligible to apply for funding from the Broadband Fund as part of larger projects that cover multiple hexagons.
9. The Commission received interventions regarding SWIFT's application from telecommunications service providers comprising Bell Canada, CoopTel jointly with Sogetel inc. (Sogetel) [collectively CoopTel/Sogetel], Cybera Inc., Saskatchewan Telecommunications (SaskTel), SSI Micro Ltd. (SSI Micro), TELUS Communications Inc. (TCI), and Xplornet Communications Inc. (Xplornet); the Chippewas of Kettle and Stony Point First Nation; advocacy groups comprising the Association of Municipal Managers, Clerks and Treasurers of Ontario, the Federation of Canadian Municipalities (FCM), and the Public Interest Advocacy Centre (PIAC); organizations comprising Bits & Pieces Studio, Blue Sky Economic Growth Corporation (Blue Sky), Daveland Farm, the Eastern Ontario Regional Network (EORN), the Economic Development Corporation of North Simcoe, Mimosa Breeding and Research, the North Simcoe Community Futures Development Corporation (NSCFDC), the Ontario Federation of Agriculture, Prashita Inc., P-ROL Process Control Inc., Skara Brae Strategy Consultants Ltd., SpeedChecker Limited (SpeedChecker), Tall Pines Agricultural Research Ltd., the Wahnekewening Community Association, Weitzel Farms Ltd., and Winchester Poultry Inc.; municipalities comprising la Municipalité régionale de comté (MRC) d'Arthabaska, the County of Brandt, the Town of Caledon, the Township of Enniskillen, the Corporation of the County of Essex, the Regional Municipality of Halton (Halton), la MRC de Mékinac, the Township of North Dumfries, la MRC de la Nouvelle-Beauce, la Municipalité d'Oka, la MRC de Roussillon, la MRC de Rouville, the Corporation of the Township of St. Clair, the Town of Tecumseh, la MRC de Vaudreuil-Soulanges, and the City of Windsor; and over 200 individuals.

Review and vary criteria

10. In Telecom Information Bulletin 2011-214, the Commission outlined the criteria it would use to assess review and vary applications filed pursuant to section 62 of the Act. Specifically, the Commission stated that applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to (i) an error in law or in fact, (ii) a fundamental change in circumstances or facts since the decision, (iii) a failure to consider a basic principle which had been raised in the original proceeding, or (iv) a new principle which has arisen as a result of the decision.

Issues

11. The Commission has identified the following issues to be addressed in this decision:
- Should the Commission vary its determination to use the hexagon methodology to determine geographic eligibility?

- Should the Commission vary its determination not to incorporate a challenge mechanism for ineligible geographic areas?
- Did the Commission introduce a new principle that in partially served hexagons, market forces are “likely” to improve connectivity?
- Should the Commission specify that proposed projects may include both eligible and ineligible hexagons?

Should the Commission vary its determination to use the hexagon methodology to determine geographic eligibility?

Positions of parties

12. SWIFT submitted that the Commission’s hexagon methodology exaggerates the size of served geographic areas, which (i) creates a misleading view of connectivity, (ii) is not intuitive for stakeholder communications, and (iii) is unnecessary. SWIFT requested that the Commission instead determine the geographic areas where broadband Internet access services are currently being provided at levels that meet the universal service objective, and then deem all other geographic areas to be eligible for funding from the Broadband Fund.
13. SWIFT argued that the Commission erred in law by prioritizing administrative objectives over the statutory objectives set out in the Act in adopting the hexagon methodology. SWIFT claimed that the Commission’s administrative objectives of minimizing administrative costs and improving communications with private sector partners do not represent sufficient legal grounds to adopt policy measures that are inconsistent with the policy objectives set out in the Act.
14. Several parties, including Bell Canada, PIAC, SaskTel, SSi Micro, and Xplornet, discussed the Commission’s role in balancing the sometimes conflicting policy objectives set out in section 7 of the Act. Some parties, such as Bell Canada, TCI, and Xplornet, agreed that the balance the Commission struck was within the range of reasonable outcomes given the fact that there is not enough money in the Broadband Fund alone to subsidize the deployment of broadband Internet access services that achieve the universal service objective for all Canadians. Similarly, PIAC submitted that it agreed with the Commission’s determination to focus funding from the Broadband Fund on geographic areas that would otherwise not receive any broadband Internet access service, rather than on areas that have some service.
15. Some parties, including SaskTel and TCI, also discussed the facts that the hexagon methodology has been successfully used in several funding programs (including Innovation, Science and Economic Development Canada’s [ISED] Connect to Innovate [CTI] program) and that the Policy Direction² encourages the Commission to implement approaches that streamline its processes. Xplornet argued that the

² *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

reduced administrative burden through a streamlined operation of the Broadband Fund directly furthers the policy objectives set out in the Act.

16. Bell Canada and TCI both submitted that the framework established in Telecom Regulatory Policy 2018-377 is reasonable and is adequately supported by a comprehensive record, which the Commission took into account to make its policy determinations. Bell Canada stated that SWIFT had the onus to demonstrate substantial doubt as to the correctness of that decision, which it failed to do.
17. In reply, SWIFT argued that the burden of demonstrating that the Commission's determinations are consistent with section 7 of the Act lies with the Commission, not the Part 1 applicant, and that the Commission did not adequately meet this burden in Telecom Regulatory Policy 2018-377 in accordance with the Policy Direction.

Commission's analysis and determinations

18. The Commission considers that the policy objectives set out in the Act include administrative objectives. For example, fostering administrative efficiency by reducing the regulatory and administrative burden on applicants to the Broadband Fund fits within the meaning of paragraph 7(f) of the Act, which includes ensuring that regulation, where required, is efficient and effective. Moreover, the Commission indicated in Telecom Regulatory Policy 2018-377 that its determinations would advance the policy objectives set out in paragraphs 7(a), (b), (c), (f), (g), and (h) of the Act.
19. Subparagraph 1(a)(ii) of the Policy Direction encourages the Commission to use measures that are efficient and proportionate to their purpose. The hexagon methodology is already developed and has been used successfully in the past by ISED, making it an efficient mechanism that can be leveraged easily and that will not cause delays or any additional burden for applicants. Conversely, the creation of new mapping tools that are unfamiliar and untested would not meet the objective set out in subparagraph 1(a)(ii) of the Policy Direction, since it would result in delays in funding being approved, which would delay the deployment of improved broadband Internet access services to Canadians.
20. Further, while the Commission agrees that it is obligated to demonstrate how its determinations are consistent with the policy objectives set out in the Act and with the Policy Direction, SWIFT has demonstrated in its arguments that it would strike a different balance amongst these objectives, not that the Commission failed to consider them.
21. The Commission considers it important for all Canadians to have access to universal service objective-level broadband services. However, the Commission has determined that at this time, its role is to fund projects in areas where Canadians would otherwise likely never get universal service objective-level service, in order to make the greatest impact with the funding available.

22. As the Commission acknowledged in Telecom Regulatory Policy 2016-496, closing the gap in broadband Internet access service availability in Canada is an enormous financial challenge, requiring billions of dollars in funding and investments, that can only be overcome through shared responsibility. As well, the Commission stated in Telecom Regulatory Policy 2018-377 that the Broadband Fund will complement – and not replace – existing and future private sector investments and other government funding within the broader funding ecosystem.
23. Accordingly, the Commission **denies** SWIFT’s request to vary the Commission’s determination to use the hexagon methodology to determine geographic eligibility. SWIFT has failed to demonstrate that there is substantial doubt as to the correctness of the Commission’s determination, which did not amount to an error in law.

Should the Commission vary its determination not to incorporate a challenge mechanism for ineligible geographic areas?

Positions of parties

24. SWIFT submitted that the Commission diverged from the best practice of allowing underserved communities to provide indicators of broadband service quality, which raises substantial doubt as to the correctness of the Commission’s [maps of areas to enhance broadband access](#).
25. SWIFT argued that the Commission failed to consider data limitations, and the precautionary principle that SWIFT put forth, which it did not define. SWIFT submitted that there was little evidence to justify the Commission’s failure to consider the precautionary principle on the basis of administrative cost savings or improved communication with the industry (e.g. by reducing the number of Broadband Fund applications or using data that is familiar to the industry).
26. SWIFT added that the Commission made a related error in fact by prioritizing the reduction of the administrative burden and cost associated with a challenge mechanism over effective communication with other stakeholders. SWIFT characterized the additional administrative costs associated with its proposed approach as no larger than a rounding error.
27. Bell Canada and Xplornet submitted that, in light of the scarce financial resources available, it was reasonable for the Commission to determine how to best allocate those resources. PIAC submitted that SWIFT’s argument that the Commission failed to consider basic principles in accordance with the test set out in section 62 of the Act is not appropriate, since SWIFT’s argument seems to actually be that the Commission should have considered basic principles differently. SSi Micro submitted that SWIFT, not the Commission, introduced a new principle, since the precautionary principle is a concept that is only recently developing in the context of international environmental law.
28. TCI proposed that applicants should be able to present compelling evidence (e.g. engineering reports, wireless signal strength measurements, and economic

analyses) that a particular geographic area in a hexagon is currently underserved and would not be served without subsidy. In its reply, SWIFT called this approach restrictive and impractical compared to the use of data provided by communities. Blue Sky submitted that broadband Internet access service quality in hexagons that appear to be covered is proven, in many cases, to be well below that posted by Internet service providers (ISPs) and that there are variances throughout the hexagon. SpeedChecker argued that without actual end-user speeds, the Commission's determinations with respect to project eligibility will be made on the basis of inaccurate and/or imprecise data.

29. Many parties, including Bell Canada and Xplornet, submitted that communities being allowed to provide evidence regarding why a particular geographic area should be eligible for funding from the Broadband Fund would cause delays and other difficulties as a result of the complex processes involved. In reply, SWIFT characterized this evidence as being critical to the efficient allocation of funds. Bell Canada also argued that the Commission did not err in refusing to incorporate a challenge mechanism. Xplornet added that SWIFT's proposed approach would increase the potential for the Broadband Fund to interfere with market forces because it does not account for future planned investments. In reply, SWIFT submitted that these arguments were not sufficient to justify the use of inaccurate or incomplete data.
30. Some communities, such as la MRC d'Arthabaska, the Town of Caledon, Halton, la MRC de Mékinac, NSCFDC, la Municipalité d'Oka, la MRC de Rouville, and the Town of Tecumseh, submitted reports and maps to demonstrate that the state of connectivity in their regions is not accurately reflected in the Commission's maps and that they should therefore be able to submit evidence to correct these inaccuracies. EORN submitted that the Commission's maps radically overstate the number of households in rural areas that have access to universal service objective-level broadband services.

Commission's analysis and determinations

31. SWIFT's request for the Commission to allow communities to provide further evidence demonstrating their eligibility for funding would be unlikely to materially alter which hexagons the Commission deems eligible. In Telecom Regulatory Policy 2018-377, the Commission considered that all households in a hexagon must be underserved for that entire hexagon to be deemed underserved and thus eligible for funding from the Broadband Fund. Variance in the level of service between households within an ineligible hexagon does not affect the overall ineligibility of the hexagon. This is because a hexagon will be ineligible for funding from the Broadband Fund even if only one household in that hexagon has broadband Internet access service that meets the universal service objective.
32. As well, the lack of consistent terminology and methodology across the maps and reports that some parties provided makes it difficult to compare them to those of the Commission, and to each other. This is precisely why the Commission determined

that it should adopt a common methodology that is familiar to applicants and that has been in place for many years.

33. The broadband Internet access service mapping data in question have been collected, refined, and improved by Commission and ISED staff for more than a decade. The Commission has many processes in place to validate the map data, such as communication with ISED, inquiries to telecommunications service providers, and information collected through various proceedings.
34. With respect to SWIFT's claims in paragraph 26 above, SWIFT provided no evidence to justify these claims or to demonstrate that the Commission erred. Moreover, as indicated above, the Commission is empowered to consider the administrative burden of its regulatory measures under the Act and the Policy Direction. SWIFT has demonstrated once again in its arguments that it would strike a different balance, not that the Commission failed to consider basic principles.
35. In addition, it is SWIFT that has introduced a new principle, the precautionary principle, which it did not define. As SSi Micro noted, this principle comes from environmental law and has not been considered in this context before. SWIFT has failed to demonstrate how this principle is applicable to the present case.
36. Accordingly, the Commission **denies** SWIFT's request to vary its determination not to incorporate a challenge mechanism for ineligible geographic areas. SWIFT has failed to demonstrate that there is substantial doubt as to the correctness of the Commission's determination to rely on the data presented in the Commission's maps, which does not amount to an error in fact.

Did the Commission introduce a new principle that in partially served hexagons, market forces are "likely" to improve connectivity?

Positions of parties

37. SWIFT submitted that the Commission introduced a new principle in Telecom Regulatory Policy 2018-377 by determining that if one household is served, it is likely that market forces will bring improved levels of broadband Internet access service to the remaining households in the hexagon. SWIFT argued that (i) there is substantial doubt as to the correctness of the Commission's determination, since this principle was not contemplated in Telecom Notice of Consultation 2017-112 nor by any party to that proceeding, and (ii) the Commission should provide an opportunity for parties to comment. Further, SWIFT argued that the Commission did not offer any analysis or refer to evidence to justify this new principle or to substantiate its validity, for example, through engineering or economic studies.
38. Several parties, including Blue Sky, CoopTel/Sogetel, and NSCFDC, supported SWIFT with respect to this relief. Many of these parties argued that market forces have failed to extend networks further into their regions, which they claimed is a good indicator that this will continue into the future. TCI conceded that in some areas, market forces may not lead to new facilities for a period of time.

39. Xplornet opposed SWIFT's position, arguing that granting SWIFT's request would increase the degree to which the Broadband Fund interferes with private investments, contrary to the Fund's guiding principles.
40. Bell Canada argued that SWIFT's position was puzzling, noting that the Commission discussed market forces in several places in Telecom Notice of Consultation 2017-112 and that several interveners discussed market forces on the record of the associated proceeding. Bell Canada noted that for example, in response to Telecom Notice of Consultation 2017-112, Rogers Communications Canada Inc. had argued that the Commission should rely on market forces in geographic areas near areas that already have broadband Internet access service because those areas are easier to reach.
41. Both PIAC and SSi Micro further submitted that reliance on market forces to achieve the policy objectives set out in the Act is hardly a new principle, since it is reflected in section 7 of the Act and in the Policy Direction, as well as in many Commission decisions. PIAC argued that therefore, it is not unreasonable or incorrect for the Commission to rely on market forces regarding the extension of broadband Internet access service coverage in areas where there is some evidence that this service is currently being provided.
42. In reply, SWIFT claimed that the Commission's determinations with respect to market forces are inconsistent with the basic principles of evidence-based decision-making, since the Commission relied on mere assumptions.

Commission's analysis and determinations

43. Market forces are not a new concept that arose in Telecom Regulatory Policy 2018-377. Both the Act and the Policy Direction require the Commission to consider market forces in making its determinations, and the question of market forces was clearly examined during the proceeding that led to that decision.
44. The Commission has attempted to avoid interference with market forces, in line with the Act and the Policy Direction, by deeming partially served hexagons to be ineligible for funding under the Broadband Fund. Moreover, nothing in Telecom Regulatory Policy 2018-377 prevents ISPs from providing broadband Internet access service in ineligible geographic areas in conjunction with the more rural and remote areas that are eligible, as discussed below.
45. Accordingly, the Commission **denies** SWIFT's request to vary its determination that market forces are likely to improve connectivity. The Commission did not introduce a new principle in Telecom Regulatory Policy 2018-377, and SWIFT has failed to demonstrate that there is substantial doubt as to the correctness of the Commission's determination with respect to market forces.

Should the Commission specify that proposed projects may include both eligible and ineligible hexagons?

Positions of parties

46. SWIFT argued that there is substantial doubt as to the correctness of the Commission's determinations with respect to geographic eligibility in Telecom Regulatory Policy 2018-377, since the Commission failed to consider a second set of basic economic principles, namely scale economics and project quality. SWIFT requested that the Commission specify that applicants with proposed projects that would serve underserved areas in partially served hexagons in the vicinity of fully underserved hexagons will be eligible to apply for funding from the Broadband Fund as part of larger projects that cover multiple hexagons. SWIFT claimed that this would result in (i) cooperation, (ii) the development of larger and more viable projects in those areas, and (iii) incentives for private sector participation and capital expenditure commitments.
47. SWIFT argued that the Commission's restrictive approach means that underserved areas in partially served hexagons in the vicinity of fully underserved hexagons will not be able to join together to develop larger, more scalable project proposals. SWIFT claimed that the Commission's failure to consider this basic principle is inconsistent with the objective of equitable and efficient allocation of funds from the Broadband Fund for viable, scalable, and sustainable projects that maximize private sector contributions.
48. Bell Canada, SaskTel, and SSi Micro all submitted that the Commission's determinations in Telecom Regulatory Policy 2018-377 do not prevent applicants from proposing a project that includes both eligible and ineligible geographic areas. TCI argued that the Commission is not obligated to address in its published decisions every point that is raised before it; therefore, the fact that these elements were not explicitly mentioned in Telecom Regulatory Policy 2018-377 does not mean that the Commission did not consider them.

Commission's analysis and determinations

49. In the proceeding that led to Telecom Regulatory Policy 2018-377, the Commission did not fail to consider scale economics and project quality, as alleged by SWIFT. The Commission determined that costs would be reimbursed only in eligible geographic areas, not that projects must serve only eligible geographic areas. SWIFT's requested relief is unnecessary because the Commission's determinations in Telecom Regulatory Policy 2018-377 do not prevent applicants from submitting projects that include ineligible geographic areas, provided that the projects are not viable without Commission funding.
50. Accordingly, the Commission **denies** SWIFT's request to specify that proposed projects may include both eligible and ineligible hexagons. The Commission determines that there is no substantial doubt as to the correctness of its determination in Telecom Regulatory Policy 2018-377.

Other matters

51. The FCM encouraged the Commission to identify rural communities with speeds of less than 25 Mbps and prioritize those communities in its first call for applications. The Commission already considered this issue in the proceeding that led to Telecom Regulatory Policy 2018-377 and stated in that decision that it would not prioritize particular geographic areas. This request for prioritization is therefore out of the scope of this proceeding.
52. TCI requested that the Commission make clarifications with respect to mobile wireless service project eligibility. The Commission considers that this issue is out of the scope of this proceeding.
53. Xplornet submitted that there was substantial doubt as to the Commission's failure to account for future planned investments in the proceeding that led to Telecom Regulatory Policy 2018-377, and that the Commission should implement protections to this effect so as not to displace investments. The Commission considers that this issue is out of the scope of this proceeding.

Conclusion

54. In light of all the above, the Commission **denies** SWIFT's application to review and vary Telecom Regulatory Policy 2018-377.

Secretary General

Related documents

- *Development of the Commission's Broadband Fund*, Telecom Regulatory Policy CRTC 2018-377, 27 September 2018
- *Development of the Commission's broadband funding regime*, Telecom Notice of Consultation CRTC 2017-112, 25 April 2017; as amended by Telecom Notice of Consultation CRTC 2017-112-1, 24 July 2017
- *Modern telecommunications services – A path forward for Canada's digital economy*, Telecom Regulatory Policy CRTC 2016-496, 21 December 2016
- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011